

**IN THE UTAH COURT OF APPEALS**

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THE STATE OF UTAH,  
*Plaintiff/Appellee,*

v.

EDDIE A. SALAZAR,  
*Defendant/Appellant.*

Appellant is not incarcerated.

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**REPLY BRIEF OF APPELLANT**

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Appeal from a judgment of conviction for one count of Burglary, a second degree felony, in violation of Utah Code §76-6-202 and one count of Theft, a class B misdemeanor, in violation of Utah Code §76-6-404, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Keith Kelly presiding.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES .....ii

INTRODUCTION ..... 1

ARGUMENT .....2

The erroneously-admitted evidence was not harmless beyond a reasonable doubt. ....2

A. Mrs. Salazar’s statements were important and not cumulative. ....9

B. Salazar’s case was harmed by his inability to cross examine Mrs. Salazer. .... 14

C. Mrs. Salazar’s statements were uncorroborated. .... 17

D. The State’s case was not overwhelming..... 18

CONCLUSION .....22

CERTIFICATE OF COMPLIANCE.....23

CERTIFICATE OF DELIVERY..... 24

Addendum A: U.S. Const. Amend. VI

TABLE OF AUTHORITIES

**Cases**

*Chapman v. California*, 386 U.S. 18 (1967) ..... 2, 18, 21, 22

*Crawford v. Washington*, 541 U.S. 36 (2004) ..... 3, 5, 15

*Dawson v. Delaware*, 503 U.S. 159 (1992) .....8, 11, 13

*Fahy v. Connecticut*, 375 U.S. 85 (1963) ..... 3

*Ohio v. Roberts*, 448 U.S. 56 (1980).....4, 5

*State v. Chavez*, 2002 UT App 9, 41 P.3d 1137 ..... 7, 11, 15, 18

*State v. Cristobal*, 2010 UT App 228, 238 P.3d 1096 .....18, 19, 20

*State v. Cruz*, 2016 UT App 234, 387 P.3d 618 .....16

*State v. Ellis*, 2018 UT 2, 417 P.3d 86 ..... 3, 5, 10, 13, 14, 16, 19, 22

*State v. Farnworth*, 2018 UT App 23, 414 P.3d 1053 ..... 6, 10, 12, 14

*State v. High*, 2012 UT App 180, 282 P.3d 1046.....8, 11, 13

*State v. Larrabee*, 2013 UT 70, 321 P.3d 1136 .....6, 9, 11, 13

*State v. Steed*, 2014 UT 16, 325 P.3d 87 .....18

*State v. Toki*, 2011 UT App 293, 263 P.3d 481 .....8, 11, 13

*State v. Villarreal*, 889 P.2d 419 (Utah 1995).....3, 5, 9, 11, 12, 14, 17, 18, 20

**Rules**

Utah R. App. P. 24 ..... 2

Utah R. Evid. 801.....10

**Constitutional Provisions**

U.S. Const. Amend. VI..... 4



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INTRODUCTION

In Salazar's opening brief ("OB"), he argues that the trial court erred by admitting into evidence statements that Salazar's deceased wife made to the investigating detective. Salazar argues that admitting Mrs. Salazar's statements violated both the confrontation clause and hearsay rules.

In the response brief ("SB"), the State agrees that the trial court violated the confrontation clause. But the State argues that the error was harmless beyond a reasonable doubt. The State argues that Mrs. Salazar's out-of-court statements to the detective were cumulative, corroborated, and unimportant and that the State's case against Salazar was overwhelming.

Salazar replies that the error was not harmless beyond a reasonable doubt. The State has not met its burden of proving the error harmless beyond a

reasonable doubt because the statements were important to the State's case, were not cumulative, were not corroborated, probably resulted in admitting inaccurate information that could otherwise have been clarified with cross examination, and harmed Salazar because the State's case was not otherwise overwhelming.

As required by Utah Rule of Appellate Procedure 24(b), this reply brief is “limited to responding to the facts and arguments raised in the appellee's . . . brief.” Matters not addressed were either adequately addressed in the opening brief or do not merit reply.

### ARGUMENT

#### **The erroneously-admitted evidence was not harmless beyond a reasonable doubt.**

The State asserts that the trial court's error of admitting Detective Olson's testimony of what Mrs. Salazar told him was harmless beyond a reasonable doubt. SB 11-22. The State is incorrect. Salazar was harmed and the State benefitted when the State was able to present Mrs. Salazar's statements without Salazar having cross examined to clarify their meaning.

The State cannot meet its burden of establishing that the trial court's error was harmless beyond a reasonable doubt. “[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” *Chapman v. California*, 386 U.S. 18, 24 (1967). “[E]rror, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a



burden to show that it was harmless." *Id.* The Supreme Court directed appellate courts to ask "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 33 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)).

"Prejudice analysis is counterfactual." *State v. Ellis*, 2018 UT 2, ¶ 42, 417 P.3d 86. Part of the State's burden was to demonstrate beyond a reasonable doubt that if this Court were to "assess the likely outcome of a trial in which [the erroneously admitted evidence] is eliminated and the jury is left to consider the remainder of the prosecution's case," there would be no different outcome. *Id.* Also, the State had to demonstrate beyond a reasonable doubt that in "[a]n alternative hypothetical," in which Mrs. Salazar were present to "testif[y] in person . . . subject to cross examination" the result would be the same. *Id.* n.2.

Courts may consider several factors to "determine whether an error was harmless beyond a reasonable doubt." *State v. Villarreal*, 889 P.2d 419, 425 (Utah 1995). These include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and . . . the overall strength of the prosecution's case." *Id.* (internal citations omitted).

The most important of these factors is "the extent of cross examination otherwise permitted" because cross examination tests the reliability of evidence. *See Villarreal*, 889 P.2d at 425; *Crawford v. Washington*, 541 U.S. 36 (2004). In

*Crawford*, a case alleging the defendant stabbed another man, "the State played for the jury [the man's unavailable wife's] tape-recorded statement to the police describing the stabbing, even though [the defendant] had no opportunity for cross-examination." 541 U.S. at 38. "The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Id.* at 42 (quoting the Sixth Amendment, attached as Addendum A). The Supreme Court rejected a previous rule, "that an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability—*i.e.*, . . . bears 'particularized guarantees of trustworthiness.'" *Id.* (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). Historical sources of the United States Constitution "suggest that [confrontation] was dispositive and not merely one of several ways to establish reliability." *Id.* at 55-56. "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Id.* at 61. "[T]he [Confrontation] Clause's ultimate goal is to ensure the reliability of evidence[.]" *Id.* "It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross examination." *Id.* "The Clause thus reflects a judgement, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." *Id.* Only cross examination can reveal an in-custody alleged accomplice's "perception of her situation." *Id.* at 66. "By replacing

categorical constitutional guarantees with open-ended balancing tests, we do violence to their design." *Id.* at 67-68.

To evaluate whether erroneously admitted evidence is corroborated, this Court should consider "the extent of cross examination otherwise permitted." *See Villarreal*, 889 P.2d at 425-26. Because *Villarreal* predates *Crawford*, this Court can harmonize *Villarreal* with *Crawford* by weighing the lack of cross-examination higher than the corroborating evidence factor because the corroboration factor restates the "reliability" test that *Crawford* rejected. *Compare Villarreal*, 889 P.2d at 425 (holding "the presence or absence of evidence collaborating or contradicting the testimony of the witness on material points" is a factor showing whether the lack of confrontation is harmless beyond a reasonable doubt) *with Roberts*, 448 U.S. at 66 (holding that an unavailable witness's testimony should be admitted when "the evidence falls within a firmly rooted hearsay exception" or when there is "a showing of particularized guarantees of trustworthiness"). Substituting reliability for cross examination "replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one." *Crawford*, 541 U.S. at 62.

There is case law to guide evaluation of other factors as well, such as "the importance of the witness'[s] testimony in the prosecution's case." *See Villarreal*, 889 P.2d at 425-26 "[W]hen a prosecutor has stated their belief that evidence is important, [appellate courts should] tread carefully before finding any error in admitting it to be harmless." *Ellis*, 2018 UT 2, ¶ 55, 417 P.3d 86 (Himonas, J.

concurring). Justice Himonas cautioned against having "trial courts . . . regularly admit testimony based, in part, on the State's representation that it's crucial, only to have our appellate courts affirm the resulting conviction because the error in admitting the testimony was harmless[.]" *Id.* ¶ 56.

"To evaluate the significance of the [evidence admitted in violation of the confrontation clause] in the context of the overall case, it is helpful to identify the discrete factual assertions" in the erroneously admitted evidence. *State v. Farnworth*, 2018 UT App 23, ¶ 26, 414 P.3d 1053. In *Farnworth*, a case about aggravated assault, reckless driving, and failure to remain at an accident involving injury, witnesses testified about the actions of an SUV driver. *Id.* ¶¶ 2, 8. This Court held that if the recorded 911 call was erroneously admitted, the admission "was harmless beyond a reasonable doubt[.]" *Id.* ¶ 23. The recorded 911 call repeated factual statements that at least six other witnesses testified to, including defense witnesses. *Id.* ¶¶ 31-32. The erroneously admitted evidence was unnecessary to the State's case and cumulative. *Id.* ¶¶ 26, 30-31. The State's case was overwhelming. *Id.* ¶ 33. Thus, the evidence was harmless beyond a reasonable doubt. *Id.* ¶¶ 7-33.

Improperly admitted evidence is important and therefore prejudicial when it "[goes] to the heart of what the jury [is] asked to decide." *State v. Larrabee*, 2013 UT 70, ¶ 36, 321 P.3d 1136. In *Larrabee*, a case involving aggravated sexual abuse of a child and dealing in materials harmful to a minor, the State improperly referred to prior, discredited allegations in closing, the use of which the trial

court had warned would result in a mistrial. 2013 UT 70, ¶¶ 1, 21, 36. In *Larrabee* "[t]here was no physical, direct, or even circumstantial evidence corroborating" the allegations against the defendant. *Id.* ¶ 35. Thus the prosecutor's misconduct "went to the heart of . . . whether Defendant's testimony was credible." *Id.* at 36.

Evidence of relationships is important. In *State v. Chavez*, the trial court's prohibition of the defense cross examining an informant on the informant's relationship to law enforcement was not harmless beyond a reasonable doubt because "the State had no physical evidence to support [the charge] against [the defendant]." 2002 UT App 9, ¶ 23, 41 P.3d 1137. In *Chavez*, a case alleging rape of a child, the State had an in-custody witness who claimed that the defendant confessed to the alleged rape. *Id.* ¶¶ 1,13. The in-custody witness admitted on cross examination "that he had testified as a police informant on at least twenty occasions." *Id.* ¶ 14. "[H]e wanted 'absolutely nothing' in exchange for his having testified." *Id.* The defense learned that the witness "was not only incarcerated while awaiting sentencing, but also . . . was acting as an informant" for federal law enforcement. *Id.* ¶ 15. "The prosecutor assured the trial court that [the in-custody witness] was not receiving any benefits for testifying in this case[.]" *Id.* "The trial court prohibited defense counsel from questioning [the in-custody informant] both about his work for [federal law enforcement] and about his current incarceration." *Id.*

Our supreme court considered the in-custody informant's "relationship as an informant" and his incarceration to be "precisely the types of topics

appropriately addressed on cross-examination." *Id.* ¶ 18. Although the defense "was allowed to elicit from [the in-custody informant]" facts concerning his criminal history including that he had previously testified for the State "and that he was then awaiting sentencing for one of those felonies," that the in-custody informant was incarcerated and was a current informant "lengthen[ed] the shadow" on his credibility. *Id.* ¶ 20. The State had no physical evidence against the defendant; its case depended instead on witness credibility. *Id.* ¶ 23. The accusing witness had some inconsistencies in her testimony. *Id.* Our supreme court was "thus unable to conclude beyond a reasonable doubt" that if the defense had been allowed to more fully cross examine the State's witness "concerning his *current* incarceration and *on-going* cooperation with" law enforcement "would not have produced a more favorable outcome for [the defendant]." *Id.* ¶ 24.

Evidence of criminal friendship can be especially important to the prosecution. Because the First Amendment protects the right of association, evidence of association, even in criminal gangs, is inadmissible unless the State proves a nexus between the association and the State's interest. *Dawson v. Delaware*, 503 U.S. 159, 166-69 (1992). Although prejudicial, criminal gang association evidence is admissible when probative of accomplices' or codefendants' relationship and collusion in the charged crime. *Id.* at 166-68; *State v. Toki*, 2011 UT App 293, ¶¶ 41-46, 263 P.3d 481; see also *State v. High*, 2012 UT App 180, ¶ 15, 282 P.3d 1046 (holding the petitioner "concede[d] that

the Gang Affiliation Evidence was probative of the three assailants' relationship and their 'alleged collusion'). Such evidence can illustrate codefendants acting together because of their association, "rather than by odd coincidence[.]" *Toki* 2011 UT App 293, ¶¶ 45, 47.

Here, the State has failed to meet its burden to prove the error was harmless beyond a reasonable doubt. First, Mrs. Salazar's statements concerning the couple's relationship to Young and her discarding pills for Young were important to the heart of the State's case against Salazar and were not cumulative. Second, admitting the statements without Salazar being able to exercise his right to confront and cross examine their accuracy harmed Salazar. Third, Mrs. Salazar's statements were not corroborated. Finally, the State's case against Salazar was not overwhelming.

A. Mrs. Salazar's statements were important and not cumulative.

Mrs. Salazar's reported reference to Young as "their friend"<sup>1</sup> was important to the heart of the State's case against Salazar. *See Larrabee*, 2013 UT 70, ¶¶ 35-36; *Villarreal*, 889 P.2d at 425-26; SB 11-16; OB 16, 30-33; R.450-51. The State argues that the reported reference to Young as the friend of the couple "didn't matter" because "[i]t was not an element of the crime." SB 15. The State is

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<sup>1</sup> The State argues that "friend" is only one word. SB 15. It is not the quantity but the quality of words that create prejudice. For example, in *Larrabee*, the prosecutor made only one reference to alleged prior sexual abuse incidents but it was "highly prejudicial since [the comments] went to the heart of what the jury was being asked to decide: whether Defendant's testimony was credible." 2013 UT 70, ¶¶ 21, 36.

incorrect: Salazar's relationship to Young as a party to the charged offenses was an element of both crimes. *C.f. Farnworth*, 2018 UT App 23, ¶¶ 29-30 (holding that although the recorded 911 caller was the only person to claim to have seen the SUV hit the motorcycle, the State did not need to prove the SUV hit the motorcycle to prove aggravated assault); SB 15; R.171-72. Salazar's jury was instructed to consider whether Salazar "solicited, requested, commanded, encouraged, or intentionally aided" Young in Young's burglary and theft. R.174. The State argued in closing that although no evidence indicated that Salazar entered or even touched the burgled house, he was guilty as Young's accomplice. R.531-33,535. When attempting to get Mrs. Salazar's statement admitted as a co-conspirator's statement under Rule 801 of the Utah Rules of Evidence, the State argued that "the content of her statement[] itself is during the conspiracy and also in furtherance . . . of the conspiracy" between Young and Salazar to commit burglary and theft.<sup>2</sup> *See Larrabee*, 2013 UT 70, ¶ 36; *Ellis*, 2018 UT 2, ¶¶ 55-56; SB 15-16; OB 16; R.431. Thus, the State's position at trial was that Mrs. Salazar's statements concerning Salazar's relationship with Young was important to "what the jury was asked to decide." *See Larrabee*, 2013 UT 70, ¶ 36; *Ellis*, 2018 UT 2, ¶ 55-56; SB 15-16; R.431,531-33. Moreover, the State was accurate in its in-trial assessment that Mrs. Salazar's statement illustrated Salazar's relationship with

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<sup>2</sup> The trial court rejected admission under Rule 801 of the Utah Rules of Evidence, reasoning that Mrs. Salazar made the statements after the conclusion of the conspiracy and not in furtherance of it. R.434-35. The trial court admitted the statements under Rule 804. OB 9; R.435-46.



Young. See *Larrabee*, 2013 UT 70, ¶ 36; SB 15-16; OB 16-18, 31; R. 150-51,171-72,174,431. The trial court also viewed Mrs. Salazar's statements as evidence of Salazar acting as a party to the offense. See *Dawson*, 503 U.S. at 166-69; *Toki*, 2011 UT App 293, ¶ 45; *High*, 2012 UT App 180, ¶ 15; *Larrabee*, 2013 UT 70, ¶¶ 35-36; SB 15-16; OB 16, 30; R.444-45.

Mrs. Salazar's alleged use of "friend" to describe Young, in context of her explanation of the Salazars' "driving around," was evidence of association, probative of the couple's relationship with Young, and implied collusion between the three of them. See *Dawson*, 503 U.S. at 166-69; *Villarreal*, 889 P.2d at 425-26; *Chavez*, 2002 UT App 9, ¶¶18, 23; *Toki*, 2011 UT App 293, ¶ 45; *High*, 2012 UT App 180, ¶ 15; SB 15-16; OB 16, 30; R.450-51. In closing argument, the State doubted that Salazar wound up driving Young to Homeowner's neighborhood "by odd coincidence[.]" See *Toki*, 2011 UT App 293, ¶ 45; see also *Villarreal*, 889 P.2d at 425-26; *High*, 2012 UT App 180, ¶ 15; *Larrabee*, 2013 UT 70, ¶¶ 35-36; R.544-45. Evidence that Mrs. Salazar called Young "their friend" added weight to the State's argument that, "there's more to that, it is not just a ride." See *Toki*, 2011 UT App 293, ¶ 45; see also *Villarreal*, 889 P.2d at 425-26; *High*, 2012 UT App 180, ¶ 15; *Larrabee*, 2013 UT 70, ¶¶ 35-36; SB 15-16; OB 16, 30; R.544-45. Trial counsel for the defense argued in closing, "[t]here's no evidence presented to you that [Salazar] and [Young] were seen together at a shopping mall days before, had known each other for years or anything of that sort." R.539. But the jury, having been instructed that witnesses' testimony and not trial counsel's

arguments, was evidence, heard evidence of Salazar's relationship with Young, that Young was "their friend." *See Dawson*, 503 U.S. at 166-69; *Toki*, 2011 UT App 293, ¶ 45; *High*, 2012 UT App 180, ¶ 15; *Larrabee*, 2013 UT 70, ¶¶ 35-36; SB 15-16; OB 16, 30; R.164, 450-51, 539. The wrongly-admitted statement prejudiced Salazar by making it more likely that Salazar was a party to Young's actions and it rebutted Salazar's defense that he was duped by a guy he met that day. *See Larrabee*, 2013 UT 70, ¶¶ 35-36; SB 15-16; OB 16, 30; R.164,450-51,502,539.

Mrs. Salazar's reported reference to Young as "their friend" was not cumulative because that factual assertion appears nowhere else in the record. *See Villarreal*, 889 P.2d at 425-26; *c.f. Farnworth*, 2018 UT App 23, ¶¶ 26, 31 (holding evidence was cumulative where it stated the same facts as testified to by six other witnesses); SB 12-14; OB 16, 31; R.450-51. The State argues that the reference is cumulative because Young testified that Mrs. Salazar was Young's sister's "good friend[]," that he met Salazar that day, and that he knew Mrs. Salazar "just through [his] sister." *See* SB 13-14; R. 502-03. The State is incorrect because Young did not say that Salazar or Mrs. Salazar were friends with Young. *See* SB 13-14; R.450-51,488,502-03. No other witnesses testified that Salazar or Mrs. Salazar were friends with Young. *See Farnworth*, 2018 UT App 23, ¶ 31; SB 13-14; OB 16.

Mrs. Salazar's wrongly-admitted statement that she discarded pills for Young was also important to the State's case. *See Villarreal*, 889 P.2d at 425-26; R.449-51. In trial, the State argued for admission of Mrs. Salazar's statements,

"[t]he part she tells the officer that Mr. Young told her to discard some of the evidence, I think that's in furtherance of the conspiracy as well." *See Ellis*, 2018 UT 2, ¶¶ 55-56; *Larrabee*, 2013 UT 70, ¶¶ 35-36; R.431. The State argued it showed Mrs. Salazar as "still part of an incident where she's still involved in helping out as a coconspirator." *See Ellis*, 2018 UT 2, ¶¶ 55-56; *Larrabee*, 2013 UT 70, ¶¶ 35-36; R.432. "[W]hat we have is one coconspirator telling another coconspirator to discard some of the evidence . . . ." *See Ellis*, 2018 UT 2, ¶¶ 55-56; *Larrabee*, 2013 UT 70, ¶¶ 35-36; R.432. In closing, the State relied on the detective "having had a chance to talk to [Mrs.] Salazar, who basically indicated, yeah, at some point [Young] also handed her some prescription medication which she discarded." *See Larrabee*, 2013 UT 70, ¶¶ 35-36; R.536; SB 16; OB 17-18. The State then argued from Mrs. Salazar's statement concerning her discarding the pills that Salazar had the same mens rea. *See Dawson*, 503 U.S. at 166-69; *Toki*, 2011 UT App 293, ¶ 45; *High*, 2012 UT App 180, ¶ 15; *Larrabee*, 2013 UT 70, ¶¶ 35-36; R.536, 538; SB 16; OB 17-18, 32-33. Where the State's case against Salazar depended on evidence of knowledge and collusion between Young, Mrs. Salazar, and Salazar, evidence of knowledge and collusion between Young and Mrs. Salazar harmed Salazar's case. *See Dawson*, 503 U.S. at 166-69; *Toki*, 2011 UT App 293, ¶ 45; *High*, 2012 UT App 180, ¶ 15; *Larrabee*, 2013 UT 70, ¶¶ 35-36; SB 16; OB 17-18, 32-33; R.536,538.

Mrs. Salazar's statement that she discarded the pills was important rather than cumulative because nowhere else in the record is there evidence that she

knew what she threw in the trash. *See Farnworth*, 2018 UT App 23, ¶ 31; *Villarreal*, 889 P.2d at 425-26; SB 12-16; OB 17-18; St.'s Ex. 1A; R.449-51. Although Young testified that he gave the pills to Mrs. Salazar to discard, he did not say that he told her what they were or that she knew what they were. *See* SB 12-14; R.496-97. In the video, Mrs. Salazar is seen combing her hair, going into the 7-Eleven, and going over to the trash can twice but never examining what she discards. St.'s Ex. 1A. She appears to try to clean her hands after the first time she throws something away. St.'s Ex. 1A. Only from her statement was the State able to argue in closing that she knew what she discarded for Young and, from that, urge that Salazar knew. *See Farnworth*, 2018 UT App 23, ¶ 31; *Villarreal*, 889 P.2d at 425-26; SB 12-16; OB 17-18; St.'s Ex. 1A; R.449-51,536-38,547. Moreover, at trial, the State did not argue that Mrs. Salazar's statement about the pills was cumulative, even though the State had the video recording from the 7-Eleven, the pills, and the knowledge that Young might testify; "incriminating" was the State's description of her statement. *See Ellis*, 2018 UT 2, ¶¶ 55-56; St.'s Ex. 1A; St.'s Ex. 11; R.427-28,431-32,438,443,445.

B. Salazar's case was harmed by his inability to cross examine Mrs. Salazar.

The State has not met its burden of showing that admitting the statements without Salazar being able to exercise his right to confront and cross examine their accuracy was harmless beyond a reasonable doubt. *See Villarreal*, 889 P.2d at 425-26. Our supreme court in *Villarreal* deemed it necessary to consider "the extent of cross examination otherwise permitted" before determining an error

harmless beyond a reasonable doubt. 889 P.2d at 425-26. The State agrees that there was no "cross examination otherwise permitted." *See id.*; SB 11; OB 16, 30.

Here, with no opportunity to confront or cross examine Mrs. Salazar, Salazar was never able to assess the reliability of Mrs. Salazar's alleged statements. *See Crawford*, 541 U.S. at 61; *Chavez*, 2002 UT App 9, ¶¶ 18, 24; R.449-51. Although Detective Olson testified to what he thought Mrs. Salazar said, only cross examination could reliably assess Mrs. Salazar's "perception of her situation." *See Crawford*, 541 U.S. at 66; *see also Chavez*, 2002 UT App 9, ¶¶ 18, 24; R.449-51. This is especially true where no physical evidence linked Salazar to the home burglary. *See Chavez*, 2002 UT App 9, ¶ 23; R.531.

If Salazar had been able to cross examine Mrs. Salazar at trial, there is evidence in the record to support that she would have testified that:

- She did not know Young;
- Young was not friends with the Salazars;
- She did not actually tell Detective Olson that Young was "their friend";
- The Salazars agreed to give Young a ride but it had to be quick because they had other obligations that day;
- The Salazars' car drove slowly along the curb to prompt Young to hurry (or perhaps for mechanical reasons or because the curb parking was zoned residential);
- She did not know what Young did in the house where they drove him;

- She told Detective Olson that Young told them in the car that the vehicle following them was someone angry with him for retrieving his own belongings;
- She told Detective Olson that Young explained he had retrieved his own belongings from the house;
- She did not see what she discarded at the 7-Eleven—she put stuff in the trash in the process of tidying the car; and
- She told Detective Olson that Young asked her to discard some items which she put in the garbage at the 7-Eleven.

*See Ellis*, 2018 UT 2, ¶ 42 n.2; OB 16, 28-31; R.423-27,449-51,456,459-62,488-97,498,502-05; St.'s Ex. 1A.

The State cannot show beyond a reasonable doubt that if, counterfactually, Mrs. Salazar had testified and been subject to cross examination, Salazar would still have needed to present Young as a witness. *See Ellis*, 2018 UT 2, ¶ 42 n.2; *see also State v. Cruz*, 2016 UT App 234, ¶ 44, 387 P.3d 618 (noting that "once a court has ruled counsel must make the best of the situation"); SB 11-22; OB 30-31. The trial court and the State suggested Salazar present Young as a substitute for Mrs. Salazar when the trial court decided to admit evidence of Mrs. Salazar's statement in violation of the confrontation clause. *See* OB 30-32; R.443-46. Absent the opportunity to cross examine Mrs. Salazar, Salazar needed to present Young to explain that Young and Salazar were not friends because the jury would

think Salazar more likely to knowingly help a friend than a stranger to commit crimes. R.450-51,502-03. Absent Mrs. Salazar to testify about why they gave Young a ride, Salazar had to present Young. R.450-51,502-04. Absent the opportunity to cross examine Mrs. Salazar, Salazar had to present Young to explain that Young told Salazar to speed up when Witness followed them because Young said he had reclaimed his own property from people now trying to hurt him or take Young's property back. R.494,497. Of course, in that situation, the State could have presented Young as their own witness. But then Salazar could have cross examined Young and exposed the same inconsistencies in his testimony and reasons to deem him unreliable that the State argues made its case overwhelming. *See Ellis*, 2018 UT 2, ¶ 42 n.2; SB 19-21.

C. Mrs. Salazar's statements were uncorroborated.

Mrs. Salazar's statements were not corroborated where she is said to have referred to Young as a friend; nor does other evidence corroborate that she knew what she discarded for Young. *See Villarreal*, 889 P.2d at 425-26; SB 12-14. As argued in Section A, *supra*, no other witness testified that Young was friends with Salazar or Mrs. Salazar. *See id.*; SB 13-14; OB 16; R.450-51,488,502-03. Mrs. Salazar's knowledge of what she threw away was similarly uncorroborated. Although, as the State argues, the 7-Eleven surveillance video shows Mrs. Salazar making two trips to the same garbage can where officers found the homeowner's pills, no evidence corroborates that Mrs. Salazar knew what she threw away. *See id.*; Section A., *supra*; SB 14-15; R.449-51; St.'s Ex. 1A. The physical evidence did

not corroborate Salazar's or Mrs. Salazar's knowledge or intent, making admission of Mrs. Salazar's statements more harmful. *See Chavez*, 2002 UT App 9, ¶ 23; *see* Section B., *supra*; St.'s Ex. 1A; R.531-32.

D. The State's case was not overwhelming.

Although the State argues that the State's case against Salazar was overwhelming, the State is mistaken. *See Villarreal*, 889 P.2d at 425-26; SB 16-22; OB 16, 29-33. The State has not shown beyond a reasonable doubt that its case was overwhelming. *See id.*; *Chapman*, 386 U.S. at 24.

First, Salazar's driving was as consistent with innocent intent as with knowingly or intentionally assisting in Young's burglary and theft. *See State v. Cristobal*, 2010 UT App 228, ¶ 16, 238 P.3d 1096 (holding that "[w]hen the evidence supports more than one possible conclusion, none more likely than the other, the choice of one possibility over another can be no more than speculation[.]"); *State v. Steed*, 2014 UT 16, ¶ 21, 325 P.3d 87 (holding that a defendant's intent may be inferred from the defendant's actions or circumstances); SB 18, 21. Second, the 7-Eleven surveillance video does not show that Salazar could see what Mrs. Salazar discarded. *See id.*; SB 18, 21. Third, Salazar's admission that he assumed Young had stolen items is consistent with drawing such an inference from being pulled over by Detective Olson. *See id.*; SB 18, 21. Finally, the State argues that Young's statements incriminated Salazar but, as argued in Section B, *supra*, the State has not shown beyond a reasonable doubt that with an opportunity to cross examine Mrs. Salazar, Salazar would still have



presented Young as a witness. *See Ellis*, 2018 UT 2, ¶ 42 n.2; SB 18-21; OB 30-31; Section B, *supra*.

Also, the State argues that Young had the stolen items in his hands when he emerged from the house but there was no evidence that Salazar saw or knew what Young had in his hands. *See SB 18*, n.7; R.424. The record similarly does not say that Salazar "watched as [Young] got out, knocked on the front door, and, when no one answered, jumped over the fence." *See SB 17*; R.423,467-68,489-90,509. While there is testimony that Young took such actions, the only evidence of Salazar's actions at this time were that he was driving slowly along the curb. R.423,467-68,472-73,489-90,509.

First, Salazar's actions while driving were at least equally consistent with innocence. Salazar's driving Young to Homeowner's house and driving along the curb while waiting are as consistent with giving an acquaintance a quick ride to pick up belongings from the acquaintance's former residence as they are with intentionally or knowingly participating in burglary and theft. *See Cristobal*, 2010 UT App 228, ¶ 16; SB 17-18; OB 16-17; R.171-72. Salazar's fast driving after leaving Homeowner's neighborhood with Young in the car is consistent with hurrying away at the request of a passenger who claims to be pursued by someone trying to hurt the passenger or take the passenger's possessions. *See id.*, 2010 UT App 228, ¶ 16; SB 18; OB 16; R.489,492-95. Quick driving is also consistent with wanting to finish an errand that the passenger said would be quick. *See id.*; SB 18; R.489.

Although the State argues that Salazar drove "faster, erratically, and recklessly to ditch" Witness, who was following, Witness did not say Salazar drove recklessly or erratically. *See* SB 18; R.471. Witness testified, "I felt like they noticed that I was behind them and was driving recklessly, so I stopped following them." R.471. Witness testified that Witness "was driving recklessly," but no one testified as to seeing<sup>3</sup> Salazar driving erratically or recklessly. *See* SB 18, R.471. Also, Witness testified that no one in Salazar's car looked back at him—rather, he assumed and felt that they knew he was there. R.474-75. There was no evidence of a high speed chase or screeching of tires. R.471,474-74,495. Moreover the detective who pulled over Salazar viewed no speeding or reckless driving. R.452.

Second, the State argues twice that Mrs. Salazar's discarding Homeowner's pills "within Salazar's eyesight" helps make the State's case overwhelming. *See Villarreal*, 889 P.2d at 425-26; SB 18, 21. But the 7-Eleven video does not show that Mrs. Salazar discarded the pills "within Salazar's eyesight." *See* SB 18, 21; St.'s Ex. 1A; R.537-38. The video is not very clear. State's Exh. 1A. While it is possible that Salazar was facing the direction of the garbage can the first time Mrs. Salazar approached the garbage can, it is equally possible that he was facing a different direction. *See Cristobal*, 2010 UT App 228, ¶ 16; St.'s Ex. 1A. Because she faced away from him, it does not look as if he could see what she threw in the trash. *See id.*; St.'s Ex. 1A; R.460,537-38. The second time she approaches the

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<sup>3</sup> Detective Olson characterized Witness's report of Salazar's driving as reckless or erratic. R.416.

trash, Salazar appears to be turned away from Mrs. Salazar. *See id.*; St.'s Ex. 1A. It is unknown on which trip to the trash can Mrs. Salazar threw away Homeowner's pills. R.450-51; St.'s Ex. 1A. While it is possible that Mrs. Salazar threw away Homeowner's pills "within Salazar's eyesight," it is at least as likely that Salazar did not see what happened. *See id.*; SB 18, 21; St.'s Ex. 1A; R.537-38.

Third, Salazar's admission that he assumed Young had stolen items is at least as consistent with drawing such an inference from being pulled over by Detective Olson as it is consistent with knowledge of guilt. *See id.*; SB 17, 18, 21. Salazar could infer he was not being pulled over for a traffic violation. R.452,462. The State has not shown beyond a reasonable doubt that Salazar's statement shows that he knowingly and intentionally assisted Young's burglary and theft because the following facts make it at least as likely that Salazar inferred that Young must have stolen something only because they were being pulled over:

- Young, whom Salazar met that day, had disappeared and then reappeared, running from a house;
- another vehicle followed them;
- Young told Salazar to speed up to avoid the following vehicle;
- After the vehicle disappeared, Salazar did not commit any traffic violations; and
- Detective Young pulled them over.


*See id.*; *Chapman*, 386 U.S. at 24; R.423-25,427,456,462.

Finally, the State argues that Young's statements incriminating Salazar help make the State's case overwhelming. *See* SB 18-21. The State is incorrect. The State has not shown beyond a reasonable doubt that Young's statements incriminated Salazar. *See Chapman*, 386 U.S. at 24. It is unclear from the transcript when Young claims to have informed Salazar that he stole items from Homeowner. *See* SB 17,19-20; R.493-94,497. Moreover, as argued at Section B. *supra*, with an opportunity to cross examine Mrs. Salazar, Salazar would not have needed to present Young as a witness. *See Ellis*, 2018 UT 2, ¶ 42 n.2; Section B, *supra*; OB 30-31. Nor can the State show beyond a reasonable doubt that if the trial had taken place without the erroneously-admitted statements, Salazar would still have needed to present Young as a witness. *See Ellis*, 2018 UT 2, ¶ 42; Section B, *supra*; OB 30-31.

#### CONCLUSION

For the reasons stated here and in the opening brief, Salazar respectfully requests that this Court reverse the trial court's ruling on Mrs. Salazar's out-of-court statement and remand this case for a new trial. *See* OB 33.

SUBMITTED this 20<sup>th</sup> day of March, 2019.

  
ANDREA J. GARLAND  
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

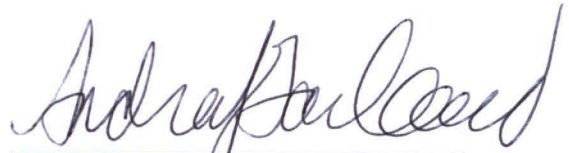
In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 5,623 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.

In compliance with rule 21(g), Utah Rules of Appellate Procedure, and rule 4-202.09(9)(A), Utah Code of Judicial Administration, I certify that, upon information and belief, all non-public information has been omitted from the foregoing brief of defendant/appellant.

  
\_\_\_\_\_  
ANDREA J. GARLAND

CERTIFICATE OF DELIVERY

I, ANDREA J. GARLAND, hereby certify that I have caused to be hand-delivered an original and five copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5<sup>th</sup> Floor, Salt Lake City, Utah 84114; and two copies to the Utah Attorney General's Office, 160 East 300 South, 6<sup>th</sup> Floor, PO Box 140854, Salt Lake City, Utah 84114, this 20<sup>th</sup> day of March 2019. A searchable pdf will be emailed to the Utah Court of Appeals at [courtofappeals@utcourts.gov](mailto:courtofappeals@utcourts.gov) and to the Utah Attorney General's Office at [criminalappeals@agutah.gov](mailto:criminalappeals@agutah.gov) within 14 days, pursuant to Utah Supreme Court Standing Order No. 8.



ANDREA J. GARLAND  
Attorney for Defendant/Appellant

DELIVERED this \_\_\_\_\_ day of March 2019.

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## ADDENDUM A





## **U.S. Const. amend VI**

### *Amendment VI*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.